In The
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-383

F. W. STANDEFER,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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CITATIONS TO OPINIONS BELOW

The August 10, 1979 en banc opinion of the Court of Appeals for the Third Circuit is not reported in the Federal 2d series. It appears at pages 1a through 72a, inclusive, of Appendix A to the petition for writ of certiorari and is reported at 79-2 USTC 7072. The opinion of the court of appeals panel was withdrawn when a rehearing by the court en banc was granted.

The opinion of the district court is reported at 452 F. Supp. 1178 (W.D. Pa. 1978)

JURISDICTION

Title 28 U.S.C. §1254(1) confers jurisdiction on this Honorable Court.

FEDERAL STATUTES INVOLVED

Title 18 U.S.C. §201(f) provides as follows:

> "Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official;" is guilty of an offense.

Title 18 U.S.C. §2 provides:

"(a) Whoever commits an offense against the United States or aids, abets,counsels, commands, induces or procures its commission, is punishable as a principal."

Title 26 U.S.C. §7214 (a)(2) imposes a criminal sanction against:

"Any officer or employee of the United States acting in connection with any revenue law of the United States. . . (2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty."

QUESTIONS PRESENTED

1. Can a defendant be convicted of aiding and abetting a principal when the only named principal, who must be an employee of the Government of the United States to have committed the substantive offense, has been acquitted by a jury of committing the substantive offense of which the aider and abettor is charged?

2. Does not the interpretation of the aider and abettor statute by the court below create a new substantive crime which Congress never intended by:

   a). allowing an aider and abettor to be convicted when the principal is tried by a jury and acquitted;

   b). eliminating the need that an aider and abettor have specific criminal intent in order to be found guilty of aiding and abetting;

   c). allowing the charge of the court below to eliminate from the consideration of the jury the correctness of returns audited by the Internal Revenue Service agent in determining the issue of intent where the jury after deliberation asked the court whether intent was to be considered in its deliberations.

STATEMENT OF THE CASE

F. W. Standefer, a vice president of Gulf Oil corporation, was indicted for aiding and abetting, 18 U.S.C. §2, an Internal Revenue Service

officer, Cyril J. Niederberger, in committing a violation of 26 U.S.C. §7214(a)(2) and for violation of 18 U.S.C. §201(f). The indictment under the 26 U.S.C. §7214(a)(2) counts charged that Standefer:

> ". . . did aid and abet Cyril J. Niederberger, an officer and employee of the United States acting in connection with the revenue laws of the United States . . . in unlawfully and knowingly, receiving a fee, compensation, and reward, as set forth below, which was not prescribed by law for the performance of his duties as an Internal Revenue Agent. . . .". (A., pp. 13, 15, 17, 20, and 22, being Counts 1, 3, 5, 7 and 9 of the indictment.)

Cyril J. Niederberger, the IRS agent identified in the Standefer indictment had been previously indicted and tried to a jury for violation of the substantive counts of 26 U.S.C. §7214(a)(2) and 18 U.S.C. §201(g). The indictment against Niederberger, to No. 76-143 Criminal, charged that Niederberger:

> ". . . did unlawfully and knowingly receive a fee, compensation, and reward, as set forth below, which was not prescribed by law for the performance of his duties as an Internal Revenue Agent. . .". (A., pp. 30, 34, 36. Counts 2, 4 and 6 of the Niederberger indictment (26 U.S.C.A. §7214(a)(2))

Counts 1, 3 and 5 of the Standefer indictment and Counts 2, 4 and 6 of the Niederberger indictment recite the same dates, times, amounts and facts. Niederberger was acquitted of the substantive offenses charging him with receiving a fee, compensation and reward, and Standefer was convicted of aiding and abetting Niederberger in unlawfully and knowingly receiving the same fee, compensation and reward of which Niederberger was acquitted. 1/

A motion to dismiss these counts of the indictment against Standefer was filed in the court below and attached to said motion were the counts of the indictment against Standefer and the counts of the indictment against Niederberger to demonstrate that they involved identical factual situations. (A., pp. 24 through 36, inclusive). Standefer's motion to dismiss was denied and the case went to trial before the court and jury. Jury selection commenced on November 29, 1977 and concluded on December 12, 1977 with a transcript in excess of 1100 pages of testimony. After the court charged

1/ Niederberger's conviction of §201(g) counts and §7214(a)(2) counts not here material was affirmed in United States v. Niederberger, 580 F.2d 63 (C.A. 3, 1978); cert. denied, 99 S.Ct. 567 (1979).

the jury and exceptions were taken by defendant to the charge on intent, the jury retired at about 12:50 P.M. At 4:15 P.M. the jury returned and presented the following question to the court:

> "Is intent to be considered in any of the nine counts?" (A. 75a)

Defendant contended that the answer to the question was "yes". The court then stated to the jury that the answer was yes and went on to attempt to distinguish elements of the offense under §201(f) and §7214(a)(2). At the conclusion of the court's remarks, Government counsel at side bar insisted that the court further charge the jury. Over the objection of counsel for defendant, the court then told the jury, inter alia, that:

> ". . . whether the returns were correct or not is not relevant in this case." (A. 87a)

After the court had charged the jury that it was not necessary to show any agreement between the revenue agent and the aider and abettor, and that if the golf trips were paid for by Gulf and authorized by Standefer, no specific or criminal intent or agreement was required, the jury returned a verdict of guilty as to all nine counts.

Post-trial motions were filed and denied by the trial court. An appeal to the Court of Appeals for the Third Circuit was taken and argued before a three-judge panel. Two of the members of the three-judge panel affirmed the conviction, with a dissenting opinion by Judge Aldisert. A petition for rehearing before the court en banc was filed and granted, and the previous opinion of the court of appeals was withdrawn. For the argument before the court en banc, counsel for the parties were directed by the clerk of the Court of Appeals for the Third Circuit to focus on the following two questions:

> "1. Whether Congress, in enacting 18 U.S.C. §2(a), intended to allow conviction of an aider and abettor even though the named principal has been acquitted.
>
> 2. Whether United States v. Bryan, 483 F.2d 88 (3rd Cir. 1973), should be overruled."

A five-judge majority of the court en banc affirmed the conviction. Two judges dissented from the conviction on all three counts on which the principal had been acquitted and Judge Gibson dissented from a conviction of one count on which the principal had been acquitted.

This case involves the specific facts of a principal going to trial to a jury and being acquitted. It does not involve the hypothetical situations referred to in the majority opinion of the court of appeals as to what might happen or what might be argued if other technicalities had arisen which resulted in the acquittal of Niederberger. 2/ A jury verdict has established factually that Niederberger was not guilty of committing the substantive offenses in receiving compensation from Standefer which Standefer is now convicted of aiding and abetting Niederberger in receiving.

SUMMARY OF ARGUMENT

It is undisputed that the substantive violation of 26 U.S.C. §7214(a)(2) under the facts of counts one, three and five of the Standefer indictment were alleged to have been committed only by Cyril J. Niederberger, the IRS agent in charge of Gulf Oil audits. It is also undisputed that the

2/ United States v. Bryan is distinguishable on its facts for the reason that the principal was found to be an innocent dupe and yet the substantive crime was committed. Niederberger had to receive compensation not authorized by law for the substantive crime to exist at all.

Niederberger case was tried to a jury, alleging that Niederberger in fact committed the substantive offense and that as to those facts relating to counts one, three and five of the Standefer indictment, Niederberger was acquitted by the jury before Standefer was even indicted. Niederberger is the only potential principal and it has been held in United States v. Shuford, 454 F.2d 772 (C.A. 4, 1971); United States v. Prince, 430 F.2d 1324 (C.A. 4, 1970); United States v. Smith, 478 F.2d 976 (D.C. C.A. 1973); United States v. Bernstein, 533 F.2d 775 (C.A. 2, 1976); United States v. Stevison, 471 F.2d 143 (C.A. 7, 1972); United States v. Jones, 425 F.2d 1048 (C.A. 9, 1970), that where the only named and potential principal is acquitted, a jury cannot convict an aider and abettor.

As will hereinafter be shown, the legislative history of the aiding and abetting statute, as well as the commentary to the Model Penal Code, would indicate that the law has not allowed an aider and abettor to be convicted where the only named principal who could have possibly committed the substantive offense has been acquitted on the factual determination by the jury finding him innocent of the substantive offense. As stated by Judge

Aldisert in his dissent (Petition for Certiorari, Appendix A, p. 42a):

> "Indeed, upon analysis, it can be seen that our court's approach here is a lonely one."

He further stated (Petition for Certiorari, Appendix A, p. 43a):

> "Even if it were the 'clear majority position' that an aider and abettor may be convicted despite acquittal of the principal, the result reached in this case is a giant step beyond the holdings of any of the cases cited by the majority."

If Standefer had been tried with Niederberger and Niederberger had been acquitted of the substantive offenses, the law is clear that Standefer would have been required to have been acquitted of the same substantive offenses. The fact that the United States attorney chose to first indict a principal and try him and then later indict an alleged aider and abettor and try him should not allow the illogical result here obtained to stand. 3/

3/ An analogy might also be drawn to the holding in Great A & P Tea Co. v. FTC, 99 S.Ct. 925, 59 L.Ed. 2d 153 (1979), that under the Robinson-Patman Act a buyer cannot be liable for a violation unless a prima facie case can be established against the seller. Your Honorable Court reversed the judgment of the FTC as affirmed by the court of appeals.

It is respectfully submitted that since the United States has chosen the method of procedure, it, as any other litigant, is bound by the findings of a prior jury under the doctrine of collateral estoppel. As stated by Mr. Justice Brennan in Ashe v. Swenson, 397 U.S. 436, 455, 90 S.Ct. 1189 (1970), the Rules of Civil Procedure require the litigation of all factual matters arising from one occurrence in one trial. Certainly the same rule should apply to the same federal government indicting individuals in the same district court, with the same grand jury, with the same facts and at the same time.

Once it is determined that the three counts of the indictment should have been dismissed before trial on defendant's motion, the issue is whether such a failure is so prejudicial to the defendant as to require a reversal and remand for new trial on the remaining counts. The court of appeals engaged in hypothetical situations not here applicable. If the three counts had been dismissed and the issues then narrowed, much of the evidence which the Government adduced in support of the three substantive counts involving §7214(a)(2) would have been inadmissible. If there is no distinction between §7214(a)(2) and §201(f) as the majority

opinion of the court of appeals would seem to hold, then the defendant was prejudiced by having to go to trial on duplicitous counts. The court at the conclusion of the case indicated the duplicitous nature of the counts when it stated to counsel in attempting to answer the jury question on intent:

> "Much of the confusion is caused by the fact that you have these duplicating counts." (A., 81a)

Counsel for the defendant had suggested that they were not duplicating but rather duplicitous counts.

The trial strategy of so complicated a case cannot be Monday morning quarterbacked. 4/ The defendant has been denied a fair trial by the failure of the trial court to eliminate three counts of the

4/ One of the errors in the trial occurred when counsel for Niederberger indicated to the court that if Niederberger were granted immunity, his testimony would be exculpatory of the defendant Standefer. The court stated that Niederberger was available to either party and the United States attorney indicated Niederberger was still under investigation and that his problems were not over. See R. 606a, 607a, 608a. At R. 609a Niederberger's counsel told the court in chambers that his client would contradict a government witness.

indictment which would eliminate much evidence and prejudice from the trial of the defendant. There are a myriad of possibilities in connection with the defense as to admissible evidence; as to trial strategy and other aspects of the conduct of the trial which the defendant should have an opportunity to present on a clear indictment involving only those counts of which a jury could properly find him guilty on the facts. But with the prejudicial facts eliminated, the defendant would have a fair trial and an opportunity to have a jury find him not guilty by reason of the lack of prejudicial evidence entering the case as well as the complications of the instructions of the trial court.

Further, in the last charge to the jury (A. 87a), the court directed that Niederberger, as the Large Case Manager, was performing an official act covered by the statute without distinguishing §7214(a)(2) or §201(f). The balance of the instruction is limited to the §201(f) counts on intent and not the specific intent under §7214(a)(2). Thus, the confusion in the counts created the unfairness to the defendant which would require a remand for new trial.

It is no answer to the prejudice to the defendant that he was convicted of a §201(f) violation because counts one, three and five require

that he be convicted of aiding and abetting the commission of the substantive offense of §7214(a)(2). In this regard, both the concurring and dissenting opinions of the Court of Appeals for the Third Circuit use the Acts interchangeably. Such confusion of applicable statutes to a defendant violates the holding in Viereck v. United States, 318 U.S. 236 at 241, 63 S.Ct. 561 at 563 (1943), in which it was held:

> "One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute or by regulation having legislative authority, and then only if punishment is authorized by Congress."

The statutes as applied by the courts, it is respectfully submitted, would be void for vagueness if the confusion is permitted to stand.

The instruction of the court on intent was improper and requires that a new trial be granted. Since the indictment specifically charges in these counts that Standefer did aid and abet Niederberger, it is necessary to look to the definitions of the words "aid and abet". Black's Law Dictionary, Fourth Edition, defines "aid and abet" as follows:

> "Help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite as to its commission. . . .
>
> Implies knowledge. . . It comprehends all assistance rendered by words, acts, encouragement, support, or presence, actual or constructive, to render assistance if necessary . . . But it is not sufficient that there is a mere negative acquiescence not in any way made known to the principal malefactor. . .".

The definitions of aid and abet all necessarily convey the fact that two persons must act in preconcert with an agreement as to their purpose. The court, on the other hand, charged the jury:

> ". . . it is not necessary to show any agreement by or with Niederberger as to any particular act or acts or duties to be performed or done, but only that something of value was given to him for or because of an official act performed or to be performed by him in the course of his duty." (A. 51a)

Specific exception was taken to this portion of the charge (A. 67a), and although the court in overruling the exception indicated that this would refer only to aiding and abetting, counsel suggested it also referred to §201. The court never told the jury which statute the statement referred to.

As a further ground for new trial, the unfairness of proceeding under the charge of the court on intent should weigh the scales in favor of the granting of a new trial. It was shown that Gulf Oil Corporation had paid in excess of $150,000,000 in taxes as a result of the Niederberger audits. The majority of the Government's case concerned the Bahamas Ex Report and an attempt to relate the timing of golf trips to dates on which audit reports were completed by Niederberger. The defense showed that Standefer had nothing to do with the Bahamas Ex Report and further showed that the $150,000,000 in taxes paid as a result of the audits reflected that Niederberger had done his job without corruption, influence, compensation, fee or reward. The court in its charge told the jury that if they concluded beyond a reasonable doubt that the vacations or trips or anything of value was given, knowing that Niederberger was in a position to use his authority to affect the conditions of the audit, then

> ". . . you could find that the things of value were given to him because of Niederberger's exercise of his authority, that is, for or because of any official act performed or to be performed.
>
> "In addition, you must find that the things of value were furnished to

> Niederberger otherwise than as provided by law for the proper discharge of his official duty." (A. 50a, 51a)

In light of that instruction and the question of intent submitted by the jury, the court's recharge of the jury directed the jury that the official act which the court was talking about was the audit in which Niederberger was the Large Case Manager; that it was sufficient if the payments were paid for any reason in connection with the audit,

> ". . . because of a desire to create a better working atmosphere, or appreciation for a speedy and favorable audit, and that any of these would be purposes that whether the returns were correct or not is not relevant in this case." (A. 87a) 5/

5/ The instruction again indicates the basic unfairness of a trial which never informs the defendant of the specific act of which he is charged with violating. There is no evidence, from all of the IRS agents who testified for the Government, that the golfing trips were to result in a speedy audit or in any way affect the outcome of the audit in time or amountwise. It again pinpoints the unfairness of a charge which says if the trip was "for any reason" given to an IRS agent, a citizen is guilty of a crime. Under that charge and interpretation, it is again suggested the statute would be void for vagueness for no citizen could be certain that a jury would find vague conduct criminal though the parties acted in good faith believing their conduct not culpable.

If the audits were improperly prepared, the Government would have attempted to prove that fact in order to establish the criminal intent involved in both §201(f) and §7214(a)(2). The converse, it is submitted, is also true, namely, that since the audits were correct, the jury had a right to consider that fact as relevant evidence on the determination of the issue of the defendant's intent which was the specific question the jury asked the court after several hours of deliberation.

Specific exception was made at the conclusion of the court's charge. The court had taken from the jury the crucial fact of the defense that every audit that was performed was performed properly. (A. 67a) The argument made to the trial judge that the correctness of the audits was a fact to be weighed by a jury and was a factual determination on a highly important element of whether or not in fact there was a crime committed.

It is also important to note that the witness John Judson Ross, in connection with his duties at Gulf Oil relating to IRS functions, was prepared to testify that in April, 1975, Gulf Oil was informed by letter of the Criminal Division of the Department of Justice that their investigation of the Bahamas Ex Report was concluded with no criminal

action being taken (A. 40a, 41a) He would also have testified the letter came after a two-year intensive investigation by the IRS special investigative unit. The testimony of the manner of the preparation of the Bahamas Ex Report and the political slush fund implications of Gulf had been extensively tried by the Government in order to poison the minds of the jury against the defendant Standefer. When the defendant attempted to neutralize the poison by showing that the Government itself had found that the Bahamas Ex Report was in fact correct and when the defendant attempted to have the court instruct the jury and permit the jury to consider the fact that the $150,000,000 (R. 502a) paid by Gulf after Niederberger's tax audits was a factor for them to consider in connection with the criminality of the golf trips, the court did not allow the evidence to be introduced and in its charge to the jury prejudiced the defendant and allowed the poison to remain. The total effect was to allow Gulf Oil, who was no longer a defendant in the case, and Niederberger, who had already been acquitted of three of the counts of the indictment, to be tried when Standefer was the sole defendant.

As previously stated, exception was made to the charge that it made no difference whether there

was any agreement with Niederberger and that an agreement need not be shown in order to convict Standefer. Aiding and abetting and counselling one to commit a crime requires an agreement. The crimes of which Standefer was indicted, especially the aiding and abetting counts, require a specific intent whether the substantive crime requires an intent or not. One cannot aid and abet an IRS agent in receiving compensation in violation of the law without an agreement as to what the compensation or fee or reward is being given for. One cannot conspire with oneself. One cannot aid and abet without the principal knowing that he is being aided and abetted. The principal must know what the fee, compensation or reward is for and the aider and abettor must know the purpose for which the fee, compensation or reward is being offered. The burden of proof beyond a reasonable doubt remains with the Government.

Since the denial of the motion to dismiss was in part based upon the same erroneous interpretations of the law by the trial court, the three counts of the indictment should be dismissed and the case remanded for new trial on the remaining six counts of the indictment.

A R G U M E N T

I.

A DEFENDANT CANNOT BE CONVICTED OF AIDING AND ABETTING A PRINCIPAL WHEN THE ONLY NAMED PRINCIPAL, WHO MUST BE AN EMPLOYEE OF THE GOVERNMENT OF THE UNITED STATES TO HAVE COMMITTED THE SUBSTANTIVE OFFENSE, HAS BEEN ACQUITTED BY A JURY OF COMMITTING THE SUBSTANTIVE OFFENSE OF WHICH THE AIDER AND ABETTOR IS CHARGED.

As stated in the statement of facts and summary of argument, the issue here involved is whether the acquittal of Niederberger demands the dismissal of the indictment on aiding and abetting against Standefer. The Court of Appeals for the Third Circuit, when ordering the matter to be heard by the court en banc, directed counsel for the Government and defendant to brief the issues of whether Congress in enacting 18 U.S.C. §2(a) intended to allow conviction of an aider and abettor even though the named principal had been acquitted and, as a corollary, whether United States v. Bryan in the Third Circuit should be overruled.

In approaching this issue, the first applicable principle of statutory construction of penal provisions is that they are strictly construed.

As Chief Justice Marshall held in United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820):

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislative, not in the judicial department."

In 1909, Congress enacted an aiding and abetting statute which provided:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." Act of March 1, 1909, Chapter 321, 35 Stat. 1152, formerly §332 of the Penal Code, now 18 U.S.C. §2(a), as amended.

The congressional intent in enacting this provision is referred to in detail by Judge Aldisert in his dissent (Petition for Certiorari, Appendix A, pp. 50a, 51a). As Judge Aldisert concluded, the reports on the Act of 1909 attempted to remove the existing impediments to the trial of an accessory, such as when the principal escaped, failed to plead, was pardoned or died. There is no reference to the

removal of the existing impediment to the conviction of an aider and abettor where the only named principal who could have committed the offense was acquitted.

In 1951, the section was amended to read as follows:

> "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

The legislative history of the amendment is short and states as follows, 1951 U.S. Code Congressional Service, p. 2583:

> "This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted. Some criminal statutes of title 18 are limited in terms to officers and employees of the Government, judges, judicial officers, witnesses, officers or employees or persons connected with national banks or member banks.
>
> "Section 2(b) of title 18 is limited by the phrase 'which if directly performed by him would be an offense against the United States,' to persons capable of committing the specific offense. Section 2(a) of such title, while not containing

that language, is open to the inference that it also is limited in application to persons who could commit the substantive offense. If regarded as a definitive section, the section makes the aider and abetter a 'principal'. It has been argued that one who is not a bank officer or employee cannot be a principal offender in violations of section 656 or 657 of title 18 and that, therefore, persons not bank officers or employees cannot be prosecuted as principals under section 2(a).

"Criminal statutes should be definite and certain."

It is noted that the amendment of 1951 changed the characterization of an aider and abettor from "a principal" to "punishable as a principal". The 1951 amendment, therefore, appeared to make definite and certain the fact that although an aider and abettor could not be indicted for the substantive crime, he could, nevertheless, be punishable as a principal if a principal has in fact committed the substantive crime. Neither the amendment nor the history tries to remove the existing impediment of the acquittal of the principal.

It is respectfully suggested that congressional consideration of the revision and reform of Title 18 of the United States Code suggests that to

date Congress has not enacted a statute which bars the acquittal of a principal as a defense to the aider and abettor. Senate Bill 1722, 96th Cong., 1st Sess., §404, under Chapter 4, labeled "complicity", 6/ contains the following language:

> "(a) TREATMENT AS PRINCIPAL.-- A person whose criminal liability is based upon section 401 may be charged, tried and punished as a principal.
>
> "(b) BAR TO PROSECUTION. -- It is a bar to a prosecution in which the criminal liability of the defendant is based upon section 401, 402, or 403 that all of the persons for whose conduct the defendant is alleged to be criminally liable have been acquitted in a separate trial or trials because of insufficient evidence determined by the court not to have been occasioned by a suppression order.
>
> "(c) DEFENSES PRECLUDED. -- Except as provided in subsection (b), it is not a defense to a prosecution in which the criminal liability of the defendant is based upon section 401, 402, or 403 that --
>
> (1) the defendant does not belong to the category of persons who by definition are the only persons

6/ It appears the Model Penal Code and the proposed revisions use complicity rather than aiders and abettors or conspirators. Thus, one could infer these changes involve broader terms than 18 U.S.C. §2(a) of which Standefer stands charged.

capable of committing the offense directly; or

(2) the person for whose conduct the defendant is criminally liable has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution."

§501 states:

> "Except as otherwise required by the Constitution or by a federal statute, the existence of a bar to a prosecution under any federal statute . . . shall be determined by the courts of the United States according to the principles of the common law as they may be interpreted in the light of reason and experience."

§404(b) would indicate that if a defendant is indicted as a conspirator with others and all others have been acquitted in a separate trial, or trials, because of insufficient evidence it is a bar to the prosecution. Except for the provision of subsection (b), Congress is proposing as a bar the defense of acquittal for the conduct of a person who the defendant is charged to be criminally liable.

Under Senate Bill 1723, introduced September 7, 1979, the same day as Senate Bill 1722,

Chapter 5 refers to complicity. §504 precludes certain defenses such as

> "(2) The person for whose conduct the defendant is being held liable has been acquitted. . .".

§505 contains, in brackets, the following:

> "[Existence of bar if accomplice's acquittal is based on ground of insufficient evidence.]"

The face of the Senate Bill indicates that:

> "Certain bracketed material may be omitted in the final version of the bill. Use of brackets also indicates alternative language and certain technical and drafting questions."

In the submitted revisions of the Criminal Code of the United States Code, Congress has not yet enacted a definitive and unambiguous statement that the acquittal of a sole principal subject to the laws of the United States will not bar the conviction of an aider and abettor. The Congressional Record of the Senate, September 7, 1979, S. 12,208, contains three short paragraphs on complicity, none of which refers to the problem presented on this appeal.

The Model Penal Code, Section 2.06(7) provides:

> "An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted."

The majority opinion of the court of appeals in upholding the conviction of an aider and abettor where the principal has been acquitted stated:

> "The clear majority position, however, is the view taken by the Model Penal Code -- namely that no such bar exists." (Petition for Certiorari, Appendix A, p. 17a)

The commentary to the Model Penal Code for Section 2.06(7) is contained in Tentative Draft 1, page 13, and contrary to the majority opinion observes:

> "The change does open up the possibility that an accomplice may be prosecuted though the person charged with the commission of the crime has been acquitted, a possibility that does not obtain in states that dispense only with requiring the previous conviction of the principal. While inconsistent verdicts of this kind present a difficulty, they are intrinsic to the jury system and appear to be a lesser evil than granting immunity to

> the accomplice because justice has miscarried 7/ in the charge against the person who committed the offense.
>
> "Whether in a joint trial of an accomplice and the person charged with the perpetration of the crime, an acquittal of the latter should require the acquittal of the former, absent evidence that the alleged accomplice committed the offense himself, ought to be governed by the general position taken with respect to the validity of an inconsistent verdict. No position on this issue has been taken, therefore, in the draft. Nor does the draft take a position on the evidential question whether the judgment of conviction or acquittal of the person charged with the commission of the crime should be admissible upon a later trial of an alleged accomplice as proof or disproof

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7/ It is interesting that the majority opinion of the court of appeals and the A.L.I. assume that if one is acquitted under the American trial system it is a miscarriage of justice rather than a declaration by the jury that no crime has been committed. See Benton v. Maryland, 395 U.S. 784, 813, 89 S.Ct. 2056, in which Justice Harlan stated:

> "The State had no more interest in compelling petitioner to stand trial again for larceny, of which he had been acquitted, than in retrying any other person declared innocent after an error-free trial. His retrial on the larceny count therefore, in my opinion, denied due process, and on that ground reversal would be called for under Palko." (Emphasis added)

of the proposition that the crime was so committed. Trials for complicity ought not be governed by a special rule of evidence on the admissibility of judgments in a later litigation involving different parties. That is a problem for the law of evidence, not for the Penal Code." (Emphasis added)

It is obvious that the Model Penal Code was drawn to allow an accomplice to be convicted if a principal is acquitted because if the statute does not so provide, such an illogical and irrational result has not been judicially decreed. The Code does not direct itself to the present fact situation where, as Judge Aldisert observed in his dissent, the only person in the world who could have committed the substantive offense as a principal was acquitted. (Petition for Certiorari, Appendix A, p. 47a)

Furthermore, since the Model Penal Code then suggests that the Rules of Evidence should govern, the Federal Rules of Evidence, Rule 201, referring to judicial notice, is apposite and provides:

"(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

"(b) Kinds of facts. A judicially noticed fact must be one not subject to

reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Under the Federal Rules of Evidence, therefore, a judge in the Federal District Court of the United States for the Western District of Pennsylvania knows that in that very court an indictment alleging the very facts against a principal as later alleged against an aider and abettor has resulted in the principal being acquitted. Judicially noticing that fact must lead to the conclusion as a matter of law that since the principal has not committed a §7214(a)(2) offense, no person subsequently can be convicted of aiding and abetting that sole principal of doing that which he has been acquitted of doing.

The application of collateral estoppel by judicial notice would be consistent with the ruling of Ashe v. Swenson, supra. Although Ashe v. Swenson dealt with double jeopardy, the philosophy of that holding is analogous to the instant situation. Niederberger, who had already been tried and acquitted of certain counts was necessarily retried as a principal in the case of Standefer, on those counts of

which he had already been acquitted, for it was Niederberger who must have received the fee, compensation or reward for the performance of his official duties as a principal for Standefer to be guilty as an aider and abettor. To that extent, Niederberger was then tried in absentia on counts 1, 3 and 5. If, as stated in Ashe v. Swenson, the Double Jeopardy clause of the Constitution responds to the increasing widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best romotes justice, economy and convenience so does collateral estoppel promote the same interests under the facts of this case.

> ". . . The Federal Rules of Criminal Procedure liberally encourage the joining of parties and charges in a single trial. Rule 8(a) provides for joinder of charges that are similar in character, or arise from the same transaction or from connected transactions or form part of a common scheme or plan. Rule 8(b) provides for joinder of defendants. Rule 13 provides for joinder of separate indictments or informations in a single trial where the offenses alleged could have been included in one indictment or information. These rules represent considered modern thought concerning the proper structuring of criminal litigation.

> "The same thought is reflected in the Federal Rules of Civil Procedure. A pervasive purpose of those Rules is to require or encourage the consolidation of related claims in a single lawsuit. Rule 13 makes compulsory (upon pain of a bar) all counterclaims arising out of the same transaction or occurrence from which the plaintiff's claim arose. Rule 14 extends this compulsion to third-party defendants. Rule 18 permits very broad joinder of claims, counter-claims, cross-claims and third-party claims. . ." Ashe v. Swenson, supra.

As stated in said opinion, the principles of res judicata and collateral estoppel caution the civil plaintiff against splitting his case. Collateral estoppel under the facts of the instant case should stand "as a constitutional barrier against possible tyranny by the overzealous prosecutor. . . ".

II.

THE INTERPRETATION OF THE AIDER AND ABETTOR STATUTE BY THE COURT BELOW CREATES A NEW SUBSTANTIVE CRIME WHICH CONGRESS NEVER INTENDED, BY (a) ALLOWING AN AIDER AND ABETTOR TO BE CONVICTED WHEN THE PRINCIPAL IS TRIED BY A JURY AND ACQUITTED; (b) ELIMINATING THE NEED THAT AN AIDER AND ABETTOR HAVE SPECIFIC CRIMINAL INTENT IN ORDER TO BE FOUND GUILTY OF AIDING AND ABETTING; (c) ALLOWING THE CHARGE OF THE COURT BELOW TO ELIMINATE FROM THE CONSIDERATION OF THE JURY THE CORRECTNESS OF RETURNS AUDITED BY THE INTERNAL REVENUE SERVICE AGENT IN DETERMINING THE ISSUE OF INTENT WHERE THE JURY AFTER DELIBERATION ASKED THE COURT WHETHER INTENT WAS TO BE CONSIDERED IN ITS DELIBERATIONS.

A. Allowing an aider and abettor to be convicted when the principal is tried by a jury and acquitted.

The amendment of the aider and abettor Act in 1951, instead of providing for the defendant to be "a principal" provided that the aider and abettor would be "punishable as a principal". Congress, under 26 U.S.C. §7214 requires that a defendant be an officer or employee of the Government of the

United States acting in connection with the revenue laws of the United States. That person is Niederberger. No amount of judicial construction or distortion of legislative purpose can establish as a substantive crime the indictment of Standefer as an employee or officer of the United States acting in connection with any revenue laws of the United States. He was a vice president of Gulf Oil Corporation. If a revenue officer of the United States, namely, Niederberger, did not violate §7214(a)(2), Standefer cannot be a principal nor can he be punishable as a principal for the principal is not punishable.

B. Eliminating the need that an aider and abettor have specific criminal intent in order to be found guilty of aiding and abetting.

The Court of Appeals for the Third Circuit had previously held that the government did not have to prove a quid pro quo in order to convict Niederberger. United States v. Niederberger, supra. Although the substantive offense has been held not to require intent, the crime of aiding and abetting, counselling, commanding, inducing or procuring the commission of a substantive offense by the very

definitions of the terms themselves would obligate the Government to prove a specific intent and agreement. As cited above, the charge of the court has eliminated that substantive requirement of proof by instructing the jury that no such agreement need be proved nor need any intent be proved. Therefore, Standefer stands convicted by an amendment to the statute by judicial fiat eliminating agreement and specific intent as elements of the substantive crime.

Furthermore, since aiding and abetting requires the interaction of two persons in violation of the specific and strictly construed criminal statutes, the decisional law concerning conspiracy is applicable. The cases unanimously hold, and the Model Penal Code, as well as the proposed revision of the Federal Criminal Code, applies the rational and logical result that if only one person is convicted out of a group of alleged co-conspirators, that person's conviction must be set aside. See Morrison v. California, 291 U.S. 82, 92, 54 S.Ct. 281, 285 (1934), which held "conspiracy imports a corrupt agreement between not less than two . . ."; Hartzel v. United States, 322

U.S. 680, 64 S.Ct. 1233 (1944); Bates v. United States, 323 U.S. 15, 65 S.Ct. 15 (1944); dictum in United States v. Fox, 130 F.2d 56 (C.A. 3, 1942), cert. denied, 317 U.S. 666; Romontio v. United States, 400 F.2d 618 (C.A. 10, 1968); Lubin v. United States, 313 F.2d 419 (C.A. 9, 1963); United States v. Whitfield, 378 F. Supp. 184 (D.C.E.D. Pa., 1974), aff'd. without opinion, 515 F.2d 507 (C.A. 3, 1975). Aiding and abetting requires a guilty principal as much as a conspiracy requires at least two guilty conspirators.

C. Allowing the charge of the court below to eliminate from the consideration of the jury the correctness of returns audited by the Internal Revenue Service agent in determining the issue of intent where the jury after deliberation asked the court whether intent was to be considered in its deliberations.

The majority of the facts introduced in the trial court involved Gulf Oil Corporation's audits and a special report titled the "Bahamas X Report" and an attempt by the Government to show that somehow the audits and the "Bahamas X Report" were related to the golf trips. Part of the defense involved the fact that since Gulf had paid some

$150,000.00 in additional taxes because of the audits and Mr. Standefer was not involved in the "Bahamas Ex Report", these facts would bear on whether Standefer had a criminal intent in providing the golf trips or if the golf trips were provided for business friendship as contended. The trial court has no discretion to take from a jury the defendant's theory of his defense on which a foundation is laid by the evidence. See United States v. Mitchell, 495 F.2d 285, 288 (C.A. 4, 1974); United States v. Leach, 427 F.2d 1107, 1112 (C.A. 1, 1970), cert. denied, 400 U.S. 829; Government of Virgin Islands v. Carmona, 422 F.2d 95, 99-100, n.6 (C. A. 3, 1970): United States v. Grimes, 413 F.2d 1376, 1378 (C.A. 7, 1969); Sparrow v. United States, 402 F.2d 828 (C.A. 10, 1968); Bursten v. United States, 395 F.2d 976, 981 (C.A. 5, 1968), cert. denied, 409 U.S. 843; Baker v. United States, 310 F.2d 924, 930 (C.A. 9, 1962), cert. denied, 372 U.S. 954; Levine v. United States, 261 F.2d 747, 748 (D.C. Cir. 1958); Marson v. United States, 203 F.2d 904, 912 (C.A. 6, 1953).

Standefer testified that the entertainment expenditures were made to establish a rapport and relieve tension that built up on the big audits. (R. 838a). He testified that it was his understanding of his duties in accordance with the policies of

Gulf Oil as to IRS agents that he was to develop a rapport and

> ". . . as a matter of fact, when I first came into Pittsburgh, I had not made this arrangement, but within a month there was a joint party between the Gulf people -- it was a joint party between the Gulf people and the IRS; and even though we were having all the friction at that point, I observed that it seemed that the people could get out on the golf course and realize that maybe the other ones weren't -- didn't have horns, and it seemed to improve communications and rapport." (R. 837a)

The defendant testified that frequently when the golf trips were taken he did not even know that the audits were either closed or were going to be closed by the I RS. (R. 864a)

Similarly, at R. pages 670a, 671a, 674a, 680a, 681a, 684a and 686a, the testimony of Fitzgerald, the co-defendant, who pleaded nolo contendere to the indictment, established that as to any of the golf outings referred to in the indictment none were in any way connected with fee, compensation or reward to Niederberger in connection with the IRS audits of Gulf Oil Corporation but were solely social golf trips, some of which Mr. Standefer did not even initiate.

The Gulf Oil audits were civil proceedings and were not adversary proceedings. They were conducted in the premises of Gulf Oil in office space provided by Gulf Oil, at no cost to the Government. In effect, the Government of the United States had its IRS agents operating out of free offices given to them by Gulf Oil for the purpose of establishing a rapport and convenience, both to the Government and to employees of Gulf so that the auditing procedure could be carried out as expeditiously and as accurately as possible. There was no legal adversary proceeding between Gulf and IRS agents in the auditing procedures. The IRS hierarchy condoned the use of free office space at Gulf's offices and participated with its employees in the acceptance of entertainment, lunches, retirement parties and the like during the entire period the audits were being conducted. With these facts in evidence, the court's charge that if the "payments were paid for any reason in connection with the audits because of a desire to create a better working atmosphere or appreciation for a speedy and favorable audit and that any of these would be purposes that whether the returns were correct or not is not relevant in this case" (A. 87a) was an erroneous charge and highly prejudicial to the defendant.

Intent was perceived by the jury to be its key function in the analysis of each of the nine counts of the indictment. On the issue of intent, this Honorable Court has scrupulously protected the right of a defendant to have that issue tried by a jury alone, without any interference by the instructions of the trial judge. In Morissette v. United States, 342 U.S. 246 (1952), it was held that:

> "[w]here intent of the accused is an ingredient of the crime charged, its existence is . . . a jury issue."

It is recognized that the issue decided in Morissette involved the charge that the law raises a presumption of intent from a particular act. However, it is respectfully submitted that the holding in Morissette establishes the principle of criminal law that it is the jury, and the jury alone, that has the right to determine intent from all of the relevant evidence and not by judicial fiat.

In United States v. United States Gypsum, 438 U.S. 422 (1978), Morissette was affirmed and your Honorable Court held:

> "[u]ltimately, the decision on the issue of intent must be left to the trier of fact alone. The instruction given invaded this factfinding function."

In an attempt to satisfy this constitutional requirement, the trial court, in its original charge (A. 58a) stated:

> "You may consider it reasonable to draw the inference and find a person intends the usual and natural, probable consequences of his act, but I say to you this is entirely up to you to decide from the facts in evidence."

With the overall erroneous charge as originally given, the jury asked whether intent was to be considered in any of the nine counts. The court then charged the jury that Niederberger's position as an IRS agent in charge of the Gulf Oil audits made him a person whose actions were official acts under the statute and took away from the consideration of the jury the issue of corrupt intention. The charge that it was sufficient if the payments were paid for any reason in connection with the audits was tantamount to a directed verdict of guilty and did not consider the defense that the golf trips were taken for friendship and were not within the purview of the meaning of the criminal statutes. The error was irreversibly compounded by again erroneously charging the jury that the correctness of the returns was not relevant nor to be considered in determining guilt. Thus, the very defense, of which there was sufficient

evidence to submit as a factual question to the jury, was taken from the jury by the charge of the court. A contrary instruction should have been given and had been requested. Exceptions protected the record for the defendant. The prejudice can only be cured by the granting of a new trial.

CONCLUSION

Standefer was sentenced to pay a fine on three counts in an indictment in which the motions to dismiss filed before trial should have been granted. The aiding and abetting statutes should be strictly construed. It should now be determined that Standefer cannot be guilty of aiding and abetting Niederberger in committing a substantive offense of which Niederberger had been previously acquitted.

The trial court erred in not dismissing the three counts of the indictment before the jury was empaneled. The trial court compounded its error in its instructions to the jury and in taking away from the jury the factual defense, of which there

was abundant evidence, that Standefer had nothing to do with the Bahamas Ex Report; that the criminal division of the IRS and the Department of Justice had declined criminal prosecution of anyone involved in the preparation of the Bahamas Ex Report; that the audits resulted in payments in excess of $150,000,000 by Gulf Oil, all to be weighed by the finder of fact in determining whether the golf trips were fee, compensation or reward under the penal statutes or friendship and social as contended by defendant. The elimination of the relevant evidence from the consideration of the jury deprived the defendant of a fair and impartial trial. Not only was that evidence removed from the jury's consideration but, after the inquiry of the jury as to whether intent was to be considered in any of the nine counts of the indictment, the court in effect directed a verdict of guilty by charging the jury that "the official act we are talking about here is the audit of the Gulf Oil Corporation's returns" by Niederberger, who was Large Case Manager assigned to said audits. The appellant is entitled to the benefit of the doubt where trial error resulted in his conviction instead of an acquittal. The remaining six counts

of the indictment should be remanded to the court below for retrial.

Respectfully submitted,

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